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would not have been voluntary. Had the court in the principal case held that the act governed and the defendant was relieved of liability, they would be deciding that a surety whose payment was non-voluntary could not recover from his co-surety for contribution. This would have been directly opposed to the contract between the parties and the laws of suretyship.

E. L. H.

SALES—PASSING OF TITLE—RISK OF LOSS—The ascertainment of the time when title passes in a sale of chattels becomes important when the chattels are destroyed before payment, since the usual rule is that the loss follows the title.¹

In *Wesco Company v. Town of Allerton*,² the defendant bought of the plaintiff an electric lighting outfit. The contract provided that: "The acceptance of this machine . . . is solely on condition, after having been tested the machine is found to fully meet all conditions . . . or it shall be removed by the town." The plaintiff was to furnish the apparatus for testing. Half the price was to be withheld until a satisfactory test was had. Upon testing, a leak was discovered, and a further test was agreed upon, pending which the defendant used the outfit. The machine was destroyed by fire, without negligence of the defendant, before the second test, and this was a suit for the cost. The Supreme Court of Iowa decided that, under these circumstances, the lower court was justified in finding, as a matter of fact, that title was not to pass until after the final test, and that therefore the plaintiff could not recover.

Except so far as the right of third persons may be concerned, the passage of title is subject entirely to the intention of the parties.³ It may happen at any stage of the proceeding, provided there is a subject of sale in existence,⁴ and in the absence of a clear agreement, the courts have laid down certain rules of convenience and presumed intention.

In the ordinary case of the sale of a specific chattel, where nothing remains to be done except to deliver or to make payment, title is held to pass,⁵ subject to the vendor's lien for the price,⁶ and this is frequently so even where the sale is said to be "for cash."⁷ Neither delivery nor payment is essential to the transfer of title.⁸

Where something remains to be done as between the parties

¹ *Joyce v. Adams*, 8 N. Y. 291 (1853).

² 137 N. W. Rep. 1046 (Ia., 1912).

³ *Byles v. Collier*, 54 Mich. 1 (1884); *Riddle v. Varnum*, 20 Pick. 280 (Mass., 1838).

⁴ *Dixon v. Yates*, 5 B. & Ad. 313 (1834); *Tarling v. Baxter*, 6 B. & C. 360 (1827).

⁵ *Hinde v. Whitehouse*, 7 East. 558 (1806).

⁶ *Wade v. Moffett*, 21 Ills. 110 (1859).

⁷ *Clark v. Greeley*, 62 N. H. 394 (1882); but see *Paul v. Carver*, 52 N. H. 136 (1872).

⁸ *Hayden v. Demets*, 53 N. Y. 426 (1873).

to put the goods in deliverable condition, or by way of examination or testing to determine whether they are in fact the goods sold, or to determine the price, it is generally presumed that title does not pass.⁹ Where the thing left undone is the securing of the approval of the vendee or of a third person, ordinarily no title passes.¹⁰ If the thing remaining to be done is to identify the goods, title cannot pass until there are definite goods appropriated to the sale, assented to by the vendee.¹¹ Contracts for the sale of part of a mass of like constituents are exceptions to the last rule. Some courts hold that title may pass to an unseparated part of such a mass, if the parties so intend.¹² Title to goods to be manufactured does not pass until the goods are completed and accepted by the vendee,¹³ although some jurisdictions require only a tender by the vendor.¹⁴

The vendee, in sales of unspecified goods, has a right of inspection before accepting them,¹⁵ and in this inspection he may use the goods or even consume a reasonable part of them.¹⁶ Using them, however, with knowledge of a defect is an acceptance and title then passes,¹⁷ though the vendee may still have a remedy upon a warranty.

In the light of the foregoing rules, it appears that the principal case is a close one, and might well have gone the other way. As soon as the machine was made, title *could* have passed, and the terms of the contract itself in speaking of "acceptance" and stipulating for a right to remove, seem to indicate that title was to pass on delivery and that the test was a condition subsequent, rather than a condition precedent, to the transfer of title. Withholding payment is not repugnant to this view. There is also to be noted the fact, not emphasized by the court, that the defendant with knowledge of the defect, used the machine to furnish light—not by way of a further test, but apparently in the regular course of business. It is perhaps true that these circum-

⁹ *Towne v. Davis*, 66 N. H. 396 (1890); *Foster v. Ropes*, 111 Mass. 10 (1872); *contra*, where the thing was to be done merely to ascertain the price. *Cleveland v. Williams*, 29 Tex. 204 (1867); *Crofoot v. Bennett*, 2 N. Y. 260 (1849).

¹⁰ *Dando v. Foulds*, 105 Pa. 74 (1884); *B. & O. R. Co. v. Brydon*, 68 Md. 198 (1885).

¹¹ *Atkinson v. Bell*, 8 Barn. & Cress. 277 (1828); *Wilkins v. Bromhead*, 6 Man. & G. 963 (1844). But see, *contra*, *Boothby v. Plaisted*, 51 N. H. 436 (1871); *Col. Springs Co. v. Golding*, 20 Col. 249 (1894).

¹² *Kimberley v. Patchin*, 19 N. Y. 330 (1859); a contrary line of decisions is represented by *Scudder v. Worster*, 11 Cush. 573 (Mass., 1853).

¹³ *Rider v. Kelley*, 32 Vt. 268 (1859); *Goddard v. Binney*, 115 Mass. 450 (1874).

¹⁴ *Shanhan v. Van Nest*, 25 Oh. St. 490 (1874).

¹⁵ *Charles v. Carter*, 96 Tenn. 607 (1896); *Holmes v. Gregg*, 66 N. H. 621 (1890).

¹⁶ *Phila. Whiting Co. v. Detroit Works*, 58 Mich. 29 (1885).

¹⁷ See *Cream City Co. v. Friedlander*, 84 Wis. 53 (1893); *Chambers v. Lancaster*, 160 N. Y. 342 (1899); *Dodsworth v. Hercules Iron Works*, 30 U. S. App. 292 (1895).

stances are not sufficient to cause the appellate court to overrule the finding of fact by the lower court that title had not passed, but it is none the less clear that a good deal can be said in support of the view that it had passed.

Sales on the instalment plan present a seeming exception to the rule that the loss follows the title. Many of the cases hold the vendee liable for the price though the goods to which he had not yet received title are destroyed. The courts reason that the promise to pay is absolute, and the vendee has received all he expected to get—possession with a right to acquire title.¹⁸ Or that, in fact, the transaction is a sale and mortgage, and should have such effect.¹⁹ Some jurisdictions, however, adhere to the more logical rule, and place the loss on the vendor.²⁰

J. C. D.

TORTS—PUBLIC SERVICE CORPORATION—LIABILITY OF WATER COMPANY TO INDIVIDUAL CITIZEN FOR NEGLIGENCE—In a recent case, the United States Supreme Court were called upon to decide the disputed question of the liability of a water supply company furnishing water to a municipality and its inhabitants under an ordinance, to respond in damages to a resident owner of property destroyed by fire on account of the negligent failure of the water company to fulfil its contract with the city to furnish adequate facilities for the extinguishment of fires, and it held that the water supply company was not liable.¹

This decision is in accord with the overwhelming weight of authority² which is based, as is pointed out in an able summary of the leading decisions on the question in 58 U. of P. Law Review, p. 556, upon the fact that these authorities all deny that there is any privity of contract between the citizen and the water company, and, there being no common law obligation on the part of the municipality to furnish water, this total lack of privity of contract is a bar to any action by the tax-payer, whether brought *ex contractu* or *ex delicto*. In no jurisdiction is there any dispute as to the inability of the injured citizen to sue on the contract itself; but upon the possibility of maintaining the action in tort for damages arising from a negligent breach of this contract there is some conflict of decisions.

¹⁸ American Soda Fountain Co. v. Vaughan, 55 Atl. Rep. 54 (N. J., 1903); Tufts v. Griffin, 107 N. C. 47 (1890); Burnley v. Tufts, 66 Miss. 48 (1888).

¹⁹ Osborne v. Shore Lumber Co., 91 Wis. 526 (1895).

²⁰ Randle v. Stone, 77 Ga. 501 (1886).

¹ German Alliance Ins. Co. v. Home Water Supply Co., 33 Sup. Ct. Rep. 32 (1912). This decision flatly overrules the former *dicta* of the Supreme Court upon this question as found in the opinion of Brewer, J., in Guardian Trust Co. v. Fisher, 200 U. S. 57 (1905); which has until now been cited as imposing this liability, in the Federal Courts.

² See III Dillon Mun. Corp., 5th Ed., p. 230 and cases cited; also Wyman, Pub. Serv. Corp., p. 305 and cases cited.